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16 *Clarkson Law Group, P.C.*

12 UNITED STATES DISTRICT COURT  
13 DISTRICT OF NEVADA  
14

15 U.S. BANK, NATIONAL ASSOCIATION,  
16 AS TRUSTEE FOR THE FIRST FRANKLIN  
17 MORTGAGE LOAN TRUST, MORTGAGE  
18 ASSET-BACKED CERTIFICATES, SERIES  
19 2007-FF1,

20 Plaintiff,

21 vs.

22 SFR INVESTMENTS POOL 1, LLC, a  
23 Nevada Limited Liability Company;  
24 D'ANDREA COMMUNITY  
25 ASSOCIATION, a Domestic Non-profit  
26 Corporation; ALESSI & KOENIG, LLC, a  
27 Domestic Limited Liability Company; SIENA  
28 HOMEOWNERS ASSOCIATION, a  
Domestic Non-Profit Corporation; THE  
CLARKSON LAW GROUP, P.C.; a Nevada  
Professional Corporation,

Defendants.

CASE NO.: 3:15-cv-00241-RCJ-WGC

**THE CLARKSON LAW GROUP, P.C.'S  
MOTION TO DISMISS**

1 Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant THE CLARKSON LAW GROUP, P.C. (the  
2 “CLG”), by and through its attorney of record, THE CLARKSON LAW GROUP, P.C., files this  
3 MOTION TO DISMISS. The Motion is based upon the attached Memorandum of Points and  
4 Authorities, the exhibits attached hereto, the pleadings and papers on file, and any oral argument that  
5 may be presented in this matter.

6 Dated this 4th day of June, 2015

7 THE CLARKSON LAW GROUP, P.C.

8  
9 /s/ Matthew McAlonis

10 ADAM H. CLARKSON, ESQ.

Nevada State Bar Number 10003

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20 *Law Group, P.C.*

**MEMORANDUM OF POINTS AND AUTHORITES**

**I. INTRODUCTION AND BACKGROUND FACTS**

This lawsuit involves real property located at 2546 Napoli Drive Sparks, Nevada 89434, APN 402-283-13 ("Subject Property"). The owner of the Subject Property failed to pay assessments on the Property as required by the Covenants, Conditions & Restrictions and Easements for the Siena Homeowners' Association ("CC&Rs"), recorded in the official records of the Washoe County Recorder's Office on December 16, 1999, as document number 2406655. As a result of the owner's failure to pay assessments on the subject Property, the Siena Homeowners' Association ("Siena HOA"), through its attorney CLG, recorded a Notice of Delinquent Assessment Lien ("NODA") on September 4, 2014, as document number 4389188 in the Official Records of Washoe County Nevada. Thereafter, the Siena HOA, through its counsel CLG recorded a Notice of Default and Election to Sell Under Notice of Delinquent Assessment Lien ("NOD") on November 4, 2014, as document number 4406283 in the Official Records of Washoe County Nevada.

Following the recording of the NOD, CLG received a request for a payoff demand on March 18, 2015. Attached hereto as **Exhibit "A"**. The Siena HOA, responded to that letter on March 23, 2015. *See Exhibit "B"*. The March 23rd response clearly provided:

All amounts outstanding on the account are itemized within this demand allowing for review and analysis of the same. ***Tender of payments amounts other than the total balance are not precluded by this demand.*** Where less than the total balance is tendered the Association may move forward with non-judicial foreclosure and the Association makes no warranty or similar representation as to the legal effect of such foreclosure as to the purchaser or to the any person/entity that may have tendered a payment prior to such foreclosure. Submission of checks or other forms of payment with accord and satisfaction language, conditional payment language, payments demanding the Association acquiescence to specific terms, payments demanding the Association record and/or otherwise warrant the legal effect of the payment, or other related submissions specifying the legal effect of the payment are not attempt at tender of payment. Rather, such submissions are attempt at settlement that may be

1 rejected. (Emphasis added)

2 U.S. Bank never responded to the payoff demand, and certainly never tendered any payment  
3 amount to the Siena HOA. Instead, U.S. Bank filed this unsubstantiated and frivolous complaint  
4 against the CLG.  
5

## 6 **II. STANDARD OF REVIEW**

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted  
8 as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129  
9 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955  
10 (2007)). A claim will be dismissed if it “appears beyond a reasonable doubt that the plaintiff can  
11 prove no set of facts in support of his claim that would entitle him to relief.” *Hishon v. King &*  
12 *Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d (1984); *Nelson v. Giurbino*, 395 F. Supp.3d  
13 946 (S.D. Cal.2005) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957)). When  
14 considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must accept as true all  
15 material allegations in the complaint, as well as reasonable inferences to be drawn from them, and  
16 must construe the complaint in the light most favorable to the plaintiff. *Nelson*, 395 F.Supp.2d at  
17 949 (citing *N.L. Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9<sup>th</sup> Cir. 1986)); *Parks School of*  
18 *Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9<sup>th</sup> Cir. 1995).  
19  
20  
21

## 22 **III. ARGUMENT**

23 The only cause of action asserted against CLG, is the Plaintiff’s second cause of action for  
24 preliminary injunction. Furthermore, a request for a preliminary injunction should be brought by  
25 motion, and not simply asserting as a cause of action. *See generally* Fed. R. Civ. P. 65. As  
26 discussed in detail below an injunction is not claim for relief but rather an equitable remedy.  
27  
28

1           **A. An Injunction Is An Equitable Remedy, Not A Claim for Relief**

2           Injunctive relief is a *remedy*, not a cause of action. *Alderson v. JP Morgan Chase, N.A., Inc.*,  
 3 No. 3:13-CV-00487-RCJ, 2014 WL 3697328 at \*1 (D. Nev. July 23, 2014). If the Court considers  
 4 U.S. Bank request for an injunction, “A preliminary injunction is available when the moving party  
 5 can demonstrate that the non-moving party’s conduct, if allowed to continue, will cause irreparable  
 6 harm for which compensatory relief is inadequate and that the moving party has a reasonable  
 7 likelihood of success on the merits.” *Boulder Creek Cmty. Ass’n v. B & J Andrews*, 125 Nev. 397,  
 8 403, 215 P.3d 27, 31 (2009); *see also* NRS 33.010. An injunction is “extraordinary relief, and the  
 9 irreparable harm must be articulated in specific terms by the issuing order or be sufficiently apparent  
 10 elsewhere in the record.” *Dep’t of Conservation & Natural Res., Div. of Water Res. v. Foley*, 121  
 11 Nev. 77, 80, 109 P.3d 760, 762 (2005). Because U.S. Bank can establish neither a likelihood of  
 12 success, nor irreparable harm, the “cause of action” for an injunction should be dismissed and/or  
 13 denied.  
 14

15  
 16           U.S. Bank requests an injunction preventing the Siena HOA or its attorney CLG from selling  
 17 the Property, or encumbering the Property with a lien. The request for an injunction should be  
 18 denied and dismissed.  
 19

20           First, as set forth in this Motion, U.S. Bank cannot establish a reasonable likelihood of  
 21 success on the merits.<sup>1</sup> U.S. Bank alleges “Clarkson provided a payoff demand which specifically  
 22 stated that it would not accept funds for the payment of the super priority lien”. Complaint ¶35.  
 23 That allegation is patently false as demonstrated by U.S. Bank’s own exhibits. *See Plaintiff’s*  
 24 **Exhibit 17**. The letter from CLG expressly provides:  
 25

26  
 27  
 28 <sup>1</sup> For the sake of brevity, CLG will not raise arguments under *SFR Investments Pool 1 LLC v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), if the previous foreclosure sale by D’Andrea was conducted properly, U.S. Bank’s deed of

1 All amounts outstanding on the account are itemized within this demand  
2 allowing for review and analysis of the same. ***Tender of payments***  
3 ***amounts other than the total balance are not precluded by this demand.***  
4 Where less than the total balance is tendered the Association may move  
5 forward with non-judicial foreclosure and the Association makes no  
6 warranty or similar representation as to the legal effect of such foreclosure  
7 as to the purchaser or to the any person/entity that may have tendered a  
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9 of payment with accord and satisfaction language, conditional payment  
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12 warrant the legal effect of the payment, or other related submissions  
13 specifying the legal effect of the payment are not attempt at tender of  
14 payment. Rather, such submissions are attempt at settlement that may be  
15 rejected. (emphasis added)

16 With Plaintiff having been provided the Siena HOA's demand, with detailed explanation  
17 thereof, it is difficult to imagine what more the Association could do in order to respond to  
18 Plaintiff's requests while still maintaining the ability to enforce its statutory lien rights.

19 If Plaintiff wants to halt the Association's foreclosure sale entirely, it can pay the full amount  
20 of the lien and the sale will be cancelled. If U.S. Bank wants to pay some lesser portion of the  
21 Association's lien that it believes will satisfy the super-priority portion of the lien, it is free to tender  
22 that amount at any time. Instead, U.S. Bank has chosen to waste the time and resources of the court  
23 and the parties involved by filing the instant lawsuit.

24 However, even assuming U.S. Bank could establish a reasonable likelihood of success on the  
25 merits, the only harm is **MONEY**, and therefore, not irreparable.

26 The Deed of Trust, which U.S. Bank claims it would like to protect through an injunction, is  
27 a contract for lending and repaying money between U.S. Bank and the Borrower. The Deed of Trust  
28 is a security interest that encumbers real property. U.S. Bank does not own the real property  
encumbered by the Deed of Trust. Thus, U.S. Bank cannot really request an injunction to avoid loss

trust would have been extinguished, and its attempt to enjoin CLG's client Siena HOA's collection efforts would be without merit as U.S. Bank has no interest whatsoever in the subject property.



1 of the real property which it does not own.

2 U.S. Bank is seeking an injunction to avoid the loss of the Deed of Trust (Complaint ¶ 90).  
3 The harm of a destroyed security interest is merely an obstruction of U.S. Bank's ability to recover  
4 the money which it lent to the Borrower. If U.S. Bank had any actual genuine interest in the real  
5 property itself, it would have purchased the Property rather than lending money to the Borrower so  
6 the Borrower could purchase the real property.  
7

8 As said by the Nevada Supreme Court:

9  
10 Generally, a harm is "irreparable" if it cannot adequately be remedied by  
11 compensatory damages. Although this court has concluded that a  
12 foreclosure may result in irreparable harm [to the owner of property]  
13 "[b]ecause real property and its attributes are considered unique," a lien is  
14 merely a preliminary step to foreclosure and does not itself instantly  
15 implicate the [owner's] loss of unique real property.

16 *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 297, 183 P.3d 895, 901 (2008). Because a  
17 loan of money is not real property, and because the loss of a security interest securing the money is  
18 fully compensable with money damages, there is no possible irreparable harm and no basis for  
19 injunctive relief.

20 Because U.S. Bank cannot establish a likelihood of success on the merits and irreparable  
21 harm, the request for injunction should be denied.

22 **C. Other than to Annoy and Harass the Clarkson Law Group, P.C. there is No Basis to  
23 Name it as a Party to the Litigation**

24 CLG provides legal services for the Siena HOA, including but not limited to, collection  
25 and/or foreclosure services. U.S. Bank has named Siena HOA in the above-entitled litigation, seeks  
26 to enjoin it from pursuing any foreclosure sale of the subject property. If U.S. Bank is ultimately  
27 successful in obtaining an injunction precluding Siena HOA from proceeding with a foreclosure sale,  
28 such an injunction would clearly apply to CLG as well. Fed R. Civ. P. 65(d)(2) provides:

1 The order binds only the following who receive actual notice of it by  
2 personal service or otherwise: (A) the parties; (B) the parties' officers,  
3 agents, servants, employees, and *attorneys*; and (C) other persons who are  
4 in active concert or participation with anyone described in Rule  
5 65(d)(2)(A) or (B).

6 Based upon the express provisions of the Federal Rules of Civil Procedure, if U.S. Bank  
7 obtained an injunction over Siena HOA, the injunction clearly would apply to its legal counsel CLG.  
8 Consequently, there is no reason to name CLG in this litigation other than to disrupt its attorney-  
9 client relationship with Siena HOA. For all the reasons stated above, the CLG's motion to dismiss  
10 should be granted.

11 Respectfully Submitted this 4th day of June, 2015.

12 THE CLARKSON LAW GROUP, P.C.

13  
14 /s/ Matthew McAlonis

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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that on the on 4th day of June, 2015, I electronically transmitted the foregoing Motion to Dismiss using the CM/ECF system for filing and transmittal of a

Notice Of Electronic Filing to the following CM/ECF registrants:

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